BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. .....

GUY WHITEFORD, *Petitioner,*

v.

THE HECHT COMPANY, a corporation, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The Justice of the District Court of the United States for the District of Columbia rendered an opinion refusing to set aside the verdict of the jury and to enter judgment for respondent *non obstante veredicto.* This opinion is set forth in the record at pages 182 to 184. The majority and minority opinions of the United States Court of Appeals for the District of Columbia have not yet been reported. They were delivered on August 16, 1943, and will be found on pages 201 to 212 of the record. The docket number of this case in the United States Court of Appeals for the District of Columbia is 8246.

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered August 16, 1943, and Petition for Rehearing denied on September 13, 1943 (R. 217).

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 348 (a)), and by virtue of alleged violation of the Seventh Amendment of the Constitution.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" of the Petition for Writ of Certiorari filed herewith, and, in the interest of brevity, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, erred:

1. In reversing the decision of the District Court of the United States for the District of Columbia by substituting their own inferences from the evidence of record for the conclusions of the jury, contrary to the letter and spirit of the Seventh Amendment of the Constitution; and

2. In disregarding the rule of law firmly established by this Honorable Court and by their own appellate court to the effect that on a motion for a directed verdict, or for judgment *non obstante veredicto,* the evidence must be construed most favorably to the plaintiff; that to this end

the plaintiff is entitled to the full effect of every legitimate inference therefrom and, if, upon the evidence so considered, fair-minded men might reasonably draw different conclusions, the reviewing court will not substitute its judgment for that of the jury.

V.

THE QUESTION INVOLVED.

The question involved is:

Is the evidence, as shown by the record, of a nature that fair-minded men might reasonably draw different conclusions as to the fact whether the petitioner was the procuring cause of the lease agreement between the respondent and the Federal Government, or is it of a nature that no reasonable man could reach a verdict in favor of the petitioner?

VI.

ARGUMENT.

A.

The two justices of the Court of Appeals, forming the majority, in reversing the judgment of the trial court refusing to set aside the verdict of the jury, have usurped the function of the jury.

This Honorable Court, in *Berry* v. *United States*, 312 U. S. 450, 85 L. Ed. 945, decided March 3, 1941, granted a writ of certiorari to determine whether or not the evidence in that case justified a directed verdict. There the jury found the petitioner was totally disabled and the Government appealed. The Circuit Court of Appeals for the Second Circuit held that the plaintiff had not produced sufficient evidence to justify the submission of the case to the jury. After the writ of certiorari was granted and upon consideration of the evidence, this Court reversed the appellate court on the ground that there was sufficient evidence

to sustain the jury's verdict, and, discussing Rule 50 (b) of the Federal Rules of Civil Procedure, authorizing district judges, under certain circumstances, to enter a judgment contrary to the jury's verdict, without granting a new trial, Mr. Justice Black, delivering the opinion of the Court, stated as follows:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—*a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts* * * *" (Italics supplied)

In a later case of this Court, on the same issue, decided March 30, 1942 (*Jacob* v. *City of New York*, 315 U. S. 752, 86 L. Ed. 1166), Mr. Justice Murphy, in delivering the opinion of this Court, stated:

> "*The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.*" (Italics supplied)

In the very recent decision of this Court in *Galloway* v. *United States*, decided May 24, 1943, Adv. Opinions 87 L. Ed. 1042, Mr. Justice Rutledge, in discussing the various standards of proof which judges have required for submission to the jury and having in mind the lack of proof, in this particular case, of uninterrupted continuity of total disability for such period of time as, by the nature of the claim there involved, it was the burden of the plaintiff to sustain, stated as follows:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed

to do duty for probative facts, *after making due allowance for all reasonably possible inferences favoring the party whose case is attacked* * * *.

"That guaranty (the Seventh Amendment) requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." (Italics supplied)

Counsel for the petitioner submit that the above expressed rule has long been well established in the District of Columbia by the following cases:

Baltimore & Potomac R. Co. v. *Carrington,* 3 App. D. C. 101, 108.

"The right to have the facts determined by the jury ceases only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff's right to recover."

Warthen v. *Hammond,* 5 App. D. C. 167, 173.

"For it is not only the right, but often the duty, of a trial court, in the interests of justice, to vacate a verdict when the court is satisfied that the preponderance of evidence is against the verdict; and its action in such regard is matter of sound discretion, not to be revised on appeal by a purely appellate tribunal. And yet, though the trial court may, and often should, set aside a verdict on the ground of the preponderance of evidence being against it, and again remit the issue to a jury, it is not for that reason authorized in the first instance to direct a verdict for the party in whose favor it regards the evidence as preponderating. Where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the revisory power of the court to order a retrial."

Adams v. *Washington & Georgetown R. Co.,* 9 App. D. C. 26, 30.

"The provinces of the court and jury in the Federal judiciary system are separate and distinct, and the line

of division between them must be carefully observed. The ascertainment of this boundary is often a matter of difficulty in a particular case, and when the difficulty arises doubts should be resolved in favor of trial by jury, which is the constitutional right of every suitor in the courts of common law.

"It is the province of the jury to determine the credibility of the witnesses and the weight of the evidence under proper directions in respect to the principles of law applicable thereto. And the court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this, we think, is substantially the doctrine of the adjudged cases that control in this jurisdiction. *Phoenix Ins. Co.* v. *Doster*, 106 U. S. 30; *Randall* v. *B. & O. R. R.*, 109 U. S. 478; *G. T. R. Co.* v. *Ives*, 144 U. S. 408, 417; *Railroad Co.* v. *Powers*, 149 U. S. 43; *Gardner* v. *Railroad Co.*, 150 U. S. 349; *Chicago, etc. R. R. Co.* v. *Lowell*, 151 U. S. 209, 217; *B. & P. R. R. Co.* v. *Carrington*, 3 App. D. C. 101, 109; *W. Gas L. Co.* v. *Poore*, 3 App. D. C. 127, 137; *Met. R. R. Co.* v. *Snashall*, 3 App. D. C. 420, 431; *Weaver* v. *B. & O. R. R. Co.*, 3 App. D. C. 436, 451; *Warthen* v. *Hammond*, 5 App. D. C. 167; *Met. R. R. Co.* v. *Falvey*, 5 App. D. C. 176; *B. & P. R. R. Co.* v. *Webster*, 6 App. D. C. 182; *D. C.* v. *Boswell*, 6 App. D. C. 402; *W. & G. R. R. Co.* v. *Wright*, 7 App. D. C. 295."

Glaria v. *Washington Southern R. Co.*, 30 App. D. C. 559, 563.

"A motion to direct a verdict is an admission of every fact in evidence, and of every inference reasonably deductible therefrom. And the motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case."

Catholic University of America v. *Waggaman*, 32 App. D. C. 307, 320.

> "The courts of review in this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury * * *. The rule more generally followed is that 'it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the court' ".

It is respectfully submitted that, judged by these standards, the refusal of the trial court in the case at bar to direct, or to set aside, the verdict was right. There was substantial evidence in support of petitioner's claim, permitting the inference on the part of the jury that the petitioner originated or set in motion, without break in their continuity, direct negotiations between The Hecht Company and the United States Government which resulted in, or produced, the entry into the lease agreement—although there may have been "evidence from which a jury could have reached a contrary conclusion" (*Berry* v. *United States, supra*). If the evidence as stated in the foregoing petition (p. 1-11), or as quoted in the dissenting opinion (R. 207) "be accepted as true, together with the reasonable inferences deducible from it, it would be clearly wrong to say that all reasonable men could draw but one conclusion from it and that conclusion utterly opposed to the plaintiff's right to recover" (*Gunning* v. *Cooley*, 58 App. D. C. 304, 308, affirmed by this Court in 281 U. S. 90).

Counsel for petitioner respectfully submit that the preservation of the principle involved, namely, that an appellate court should not substitute its own opinion for that of the jury, as a living and subsisting principle of our administration of justice is of a magnitude greater than merely to compel the registering of a nostalgic regret about the passing away of a judicial tradition in the District of Columbia. Having recognized the salutary wisdom of this principle as one which distinguishes our judicial system from deci-

sions of a Court of Star Chamber, counsel for the petitioner object most emphatically to the relegating of this axiomatic principle by the majorty of the court below to the obscure position of the folklore of the law, so to speak, within which the right of trial by jury survives merely as a cherished illusion in the beliefs and traditions of the common people. They feel supported and encouraged in their stand against the derogation of this principle by numerous unsolicited expressions of amazement and concern over the majority opinion in this case, received from members of the bar, and they respectfully call to the attention of this Court an article of Mark DeWolfe Howe which appeared in 52 Harv. L. R. 582: "Juries as Judges of Criminal Law". Although dealing mainly with juries in criminal cases, the following language applies with equal force to civil actions:

> "Many will feel, no doubt, that the democratic thesis that juries are competent to decide questions of criminal law was naive and mistaken in the extreme. Even if that be so, the story does not lose its importance. We have seen how readily the courts themselves adopted the thesis in our earlier years when judges, even, were occasionally naive. The democratic demand that the people themselves partake in the process of interpreting the law was so ardently made that many courts were unwilling to deny it. After the judges had satisfied this demand, and despite its constant repetition, they regretted their own early tolerance, condemned the legislative interference with judicial processes, and by various means reversed their prior holdings.
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> "The court which had once found the jury's right to be 'a true principle of the common law', 'a great landmark of liberty' which is 'peculiarly appropriate to a free government' could later find that right to be 'contrary to the fundamental maxims of the common law' and unconstitutional. Such a reversal of opinion, if it were isolated, might have little significance, but when many courts throughout the country are found to be making the same shift and to be doing so despite the

provisions of statutes and constitutions, there is revealed one aspect of that basic conflict in the legal history of America—*the conflict between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges.*" (Italics supplied.)

Who shall prevail?

B.

The two justices of the Court of Appeals, forming the majority, have disregarded the well established rule that on a motion for peremptory instruction the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.

This Court stated in *Chesapeake & Ohio Railway Company* v. *Martin and Porter*, 283 U. S. 209, 75 L. Ed. 983, as follows:

> "A demurrer to the evidence must be tested by the same rules that apply in respect to a motion to direct a verdict. *Schuchardt* v. *Allens*, 1 Wall. 359, 369, 370, 17 L. Ed. 642, 646; *Merrick* v. *Giddings*, 115 U. S. 300, 305, 29 L. Ed. 403, 405, 6 S. Ct. 65. In ruling upon either, *the court must resolve all conflicts in the evidence against the defendant;* but is bound to sustain the demurrer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are *legally* insufficient to serve as the foundation for a verdict in favor of the plaintiff." (Italics supplied)

A year earlier, in 1930, this Court had held in *Gunning* v. *Cooley*, 281 U. S. 90, 74 L. Ed. 720, Mr. Justice Butler speaking for the Court, as follows:

> "And in determining a motion of either party for a peremptory instruction, *the court assumes that the evi-*

> *dence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.*" (Italics supplied)

Within the jurisdiction of the District of Columbia this rule has, heretofore, consistently been adhered to by the court below. Its most known expression is found in *Jackson* v. *Capital Transit Co.*, 69 App. D. C. 147, 99 Fed. (2nd) 380, where the court below stated as follows:

> "However, on a motion for a directed verdict, it is well settled that *the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom. If upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted.* A mere scintilla of evidence is not sufficient for this purpose, however. The question is not whether there is any evidence 'but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'. *Pleasants* v. *Fant*, 22 Wall. (U. S.) 116, 121, 22 L. Ed. 780". (Italics supplied)

To the same effect:

> *Hopkins* v. *Baltimore & Ohio R. Co.*, 65 App. D. C. 167, 81 Fed. (2nd) 894.
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> *Schwartzman* v. *Lloyd*, 65 App. D. C. 216, 82 Fed. (2nd) 822.
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> *Speirs* v. *District of Columbia*, 66 App. D. C. 194, 85 Fed. (2nd) 693.
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> *S. S. Kresge Co.* v. *Kenney*, 66 App. D. C. 274, 86 Fed. (2nd) 651.
>
> *Fleming* v. *Fisk*, 66 App. D. C. 350, 87 Fed. (2nd) 747.
>
> *Walford* v. *McNeil*, 69 App. D. C. 247, 100 Fed. (2nd) 112.

Tobin v. *Pennsylvania R. Co.*, 69 App. D. C. 262, 100 Fed. (2nd) 435, certiorari denied, 59 S. Ct. 488, 306 U. S. 640, 83 L. Ed. 1040.

C.

The inference drawn from the evidence that petitioner was the procuring cause is within the realm of reasonably deducible fact and not mere speculation.

It is respectfully submitted that the evidence as outlined on pages 1-11 of the Petition for Writ of Certiorari, represents "more than a mere scintilla" (*Gunning* v. *Cooley, supra*). The following events, and conclusions reasonably to be drawn therefrom, definitely permit as a reasonable inference that the petitioner, contrary to the majority opinion (R. 203), had a "part in the chain of causation which resulted in the lease to the Federal Government":

The submission of respondent's property to Guthridge in February, 1936 (R. 14, 15), which the latter recalled, except the date thereof (R. 151); the inspection of the property around the middle of April, 1936, by McAllister (R. 55); the discussion of the property between Guthridge and McAllister at that time (R. 132, 135); the testimony that this discussion was "among the sources" of information which Guthridge had of the property, leading to the compelling conclusion, since no other submission by other brokers had occurred prior thereto (R. 150, 130), and since Guthridge remembered the availability of the property without consulting later written submissions thereof (R. 132, 133), that this "source" must, of necessity, have been the first *causa causans;* the frustration of petitioner's efforts by respondent's consistent and categorical denial of its consent to a tenancy by the Federal Government, while—leaving the petitioner in ignorance thereof—direct negotiations were had by the respondent with the Federal Government (R. 103, 34, 104, 105, 39, 70, 99); the final cli-

mactic statement by Quirk to the effect that the petitioner ultimately had convinced the respondent "that it was the best thing to do" (R. 70), which statement would seem to be an adequate, and very plausible, expression of what Quirk testified was the cause of his change of mind with respect to a Government tenancy, to wit, "it was the best we could do with it" (R. 97-98).

VII.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the United States Court of Appeals for the District of Columbia be reversed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

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